

**UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS**

GERALDINE FAVALORO, for herself and on)	
behalf of all others similarly situated,)	Case No. 05-11594 RCL
)
Plaintiff,)	
)
vs.)	
)
PRESIDENT AND FELLOWS OF HARVARD)	
COLLEGE, BAYVIEW CREMATORY, LLC,)	
a New Hampshire Limited Liability Company)	
LINDA STOKES, Trustee of the Dekes Realty)	
Trust of 107 South Broadway, Lawrence,)	
Massachusetts, and JOHN J. GENTILE)	
)
Defendants)	

**PRESIDENT AND FELLOWS OF HARVARD COLLEGE'S
RESPONSE TO PLAINTIFF'S PROPOSED FINDINGS FOR
ENTRY OF SEPARATE AND FINAL JUDGMENT**

On March 29, 2006 the President and Fellows of Harvard College ("Harvard") moved for entry of a separate and final judgment pursuant to Federal Rule of Civil Procedure 54(b). On May 4, 2006 the Court denied the motion without prejudice pending the filing of detailed proposed findings. Plaintiff filed proposed findings on May 9, 2006. While Harvard does not object to certain of the findings proposed by Plaintiff, some of the proposed findings require clarification to accurately reflect the Court's reasons, as stated on the record at the December 19, 2006 hearing, for dismissing all claims against Harvard.

As an initial matter, Plaintiff's footnote 2 concerning the Massachusetts Supreme Judicial Court's recent ruling in *Carey v New England Organ Bank, et al*, 446 Mass. 270 (2006) must be addressed. Contrary to Plaintiff's contention, the *Carey* case, decided after this Court's ruling dismissing Harvard, did not alter the law with respect to good faith immunity under the Massachusetts Uniform Anatomical Gift Act ("UAGA"). The Supreme Judicial Court affirmed

the Superior Court's grant of summary judgment, holding that the facts alleged were insufficient to overcome the UAGA's immunity provision. *See Carey*, 446 Mass. at 285. The Supreme Judicial Court, like the Superior Court before it, defined good faith under the UAGA as "an honest belief, the absence of malice or the absence of a design to defraud or to seek an unconscionable advantage over another." *Id.* at 282. The Supreme Judicial Court's decision provides additional support for this Court's dismissal of the claims against Harvard.

The following are the findings proposed by Plaintiff at paragraph 6 of her Proposed Findings and Harvard's position on each proposal:

Plaintiff's proposed finding at ¶ 6(a): The Class Representation Complaint sets out separate claims for negligence against Harvard, John J. Gentile and Bayview. The claims for negligent infliction of emotional distress and intentional infliction of emotional distress are asserted against these three defendants, as well as Linda Stokes, Trustee.

Harvard does not object to this proposed finding.

Plaintiff's proposed finding at ¶ 6(b): The claims against Harvard and John J. Gentile are further related because of the allegations of agency associated with the services provided by John J. Gentile for Harvard.

Harvard objects to this proposed finding and proposes the following instead: In her Complaint, Plaintiff alleges that John J. Gentile, a licensed funeral director, was an agent of Harvard. *See* Complaint at ¶23.

Plaintiff's proposed finding at ¶6(c): The statutory immunity for "good faith" is only available to and was only asserted by Harvard and John J. Gentile. Other independent grounds for dismissal asserted by Bayview and Linda Stokes, Trustee were rejected.

Harvard does not object to this proposed finding.

Plaintiff's proposed finding at ¶6(d): Ms. Favaloro had failed to plead acts of bad faith on the part of Harvard and John J. Gentile.

Harvard objects to the proposed finding and proposes the following: The facts alleged in Plaintiff's complaint against Harvard and Mr. Gentile allege nothing more than negligence. There are no allegations of bad faith by Harvard or Mr. Gentile. *See Dec. 19, 2005 Hearing Transcript* at p. 32-34, relevant pages attached as Exhibit A.

Plaintiff's proposed finding at ¶6(e): The Court determined as a matter of law that Harvard and John J. Gentile had acted in "good faith" and were therefore entitled to statutory immunity.

Harvard objects to this finding as an inaccurate representation of the Court's holding, and proposes the following: The Court found that, making all inferences in favor of Plaintiff, Plaintiff nonetheless failed to suggest any set of facts that could give rise to an allegation of bad faith conduct by Harvard or Mr. Gentile. *Id.* at p. 32-35. The Court accordingly dismissed the claims against Harvard and Mr. Gentile pursuant to the good faith immunity provision of the UAGA. *Id.*

Plaintiff's proposed finding at ¶6(f): The Court determined that any attempted amendment would be futile in that there were no set of facts that would avoid the statutory immunity.

Harvard objects to this proposed finding as an inaccurate representation of the Court's decision and proposes the following: The Court provided Plaintiff an opportunity to detail her proposed amended allegations against Harvard and Mr. Gentile. *Id.* at p. 46. Plaintiff was unable to identify any allegation against Harvard or Mr. Gentile that would amount to bad faith conduct. *Id.* at p. 46-48. The Court accordingly dismissed all claims against Harvard and Mr. Gentile with prejudice and denied Plaintiff's request for leave to amend her complaint. *Id.* at p. 48.

Plaintiff's proposed finding at ¶6(g): The dismissal of all claims against the party Defendants, Harvard and John J. Gentile, were dismissed with prejudice.

Harvard does not object to this proposed finding.

Conclusion

Harvard requests that the Court enter a separate and final judgment in favor of Harvard pursuant to Federal Rule of Civil Procedure 54(b) accompanied by the specific findings as set forth above.

Respectfully submitted,

PRESIDENT AND FELLOWS OF HARVARD
COLLEGE

By: /s/ Edward P. Leibensperger

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Date: May 15, 2006

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic filing (NEF) and paper copies will be sent to those indicated as non registered participants on May 15, 2006.

/s/ Melissa L. Nott

Melissa L. Nott

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GERALDINE FAVALORO,
Plaintiff, Civil Action No. 05-11594-RCL
V. December 19, 2005, 3:17 p.m.
PRESIDENT AND FELLOWS OF
HARVARD COLLEGE, ET AL,
Defendants.

TRANSCRIPT OF MOTION HEARING
BEFORE HONORABLE REGINALD C. LINDSAY
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
BOSTON, MA 02210

DEBRA M. JOYCE, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
1 Courthouse Way, Room 5204
Boston, MA 02210
617-737-4410

<p style="text-align: right;">Page 30</p> <p>1 failure to comply with the statute, which Mr. Charlip was 2 referencing 3 It's those claims that are protected by the 4 immunity; and, therefore, the case has to be dismissed against 5 Harvard 6 And it's -- the cases that I referenced to your 7 Honor, the MacKnight case in particular, suggest where good 8 faith is involved in the matter, that there's no -- that 9 there's no reason to proceed to discovery unless the plaintiff 10 has some colorable claim that would give rise to an inference 11 of bad faith because, ultimately, that's the issue of the case 12 and it should not proceed unless the plaintiff has some 13 colorable basis for that claim of bad faith 14 MR. ROBERTSON: Briefly, your Honor We're in 15 federal court, everybody knows we have Rule 11, there's got to 16 be some basis for going forward here 17 THE COURT: There's a Rule 11 in state court, too, 18 isn't there? 19 MR. ROBERTSON: There is. It has a little different 20 connotation in my experience Here we are in federal court 21 We've yet to hear, "They're not my mom's ashes; they're a 22 mixture of ashes " We've yet to hear anything that actually is 23 wrong about what happened Be that as it may, we have you 24 should have known more Anybody who went into the cafeteria 25 downstairs may not have checked for a creamery license, a food</p>	<p style="text-align: right;">Page 32</p> <p>1 They can't assert it's really a negligence case at its core 2 issue and then say, oops, maybe we missed, we really have this 3 bad faith case against Mr. Gentile 4 Thank you, your Honor 5 THE COURT: Okay. 6 Well, I'm prepared to rule on these motions having 7 heard the argument 8 Taking Harvard's motion and the motion of Gentile 9 first, the provision in the Uniform Anatomical Gifts Act that 10 is at issue is section 13 This is Massachusetts General Laws 11 Chapter 113 section 13(c) 12 That statute reads, "A person who acts in good 13 faith in accordance with the terms of sections 7 to 13 14 inclusive or under the anatomical gift laws of another state or 15 a foreign country shall not be liable for damages in any civil 16 action or be subject to prosecution in any criminal proceeding 17 for his act. 18 First, let me point out that the immunity created 19 by this statute extends to a person, any person who acts in 20 good faith That would cover Harvard and Gentile acting in 21 good faith And what this statute does, as I read it, is to 22 immunize persons acting in good faith from any claim, except a 23 claim of -- that the conduct of the defendant was conduct in 24 bad faith As such, the statute eliminates all causes of 25 action in which there is no allegation of bad faith or the</p>
<p style="text-align: right;">Page 31</p> <p>1 license or lots of licenses Maybe they were negligent, but 2 were they extremely outrageous in their conduct as taking on 3 faith that a business was doing business and they had a 4 transaction? 5 Instead, what we hear is doing business with 6 somebody in New Hampshire is in itself sort of -- there's a 7 presumption of nefariousness I don't get that. That doesn't 8 come out of any law that I know of Nor the implication here 9 that there was a better price to be had in New Hampshire 10 Saving a little money for a program like this to me doesn't 11 seem to involve any nefarious presumption 12 Instead, where we are in is paragraph 42 of their 13 complaint it says, "The core issue which presents facts and law 14 that predominate over all issues was the failure to make even 15 the slightest investigation about Bayview's authorization to 16 conduct business as a crematory " That's the basis of 17 paragraph 42 That's negligence at its best It's not bad 18 faith, it's not extreme and outrageous, it's not intentional 19 conduct 20 So as to Mr. Gentile, I would submit that the 21 statutory provision providing for immunity is directly on 22 point; and the 1st Circuit in the case of Colonial Mortgage 23 Banking pointed out that litigants are not permitted to assert 24 contradictory positions to avoid dismissal 25 They can't have their cake and eat it, too, here</p>	<p style="text-align: right;">Page 33</p> <p>1 absence of good faith 2 So while my initial thought that maybe this is a 3 defense and that it can be raised as an affirmative defense, it 4 should not preclude the progress of this case in the face of a 5 motion to dismiss I think that the statute properly read puts 6 the burden of pleading upon the plaintiff; that is to say, the 7 plaintiff must plead the absence of bad faith or lack of good 8 faith against parties that wanted to proceed 9 And Mr. Robertson has put his finger on an 10 important -- and perhaps I think maybe Mr. Leibensperger did as 11 well -- the central allegation of the complaint as it relates 12 to Harvard and Gentile, and that's paragraph 42 13 Paragraph 42 in full reads: "The unauthorized and 14 illegal operation of the Bayview Crematory, as well as its 15 improper, offensive, and mortifying method of operation, 16 together with its deficient and/or nonexistent recordkeeping 17 practice, as well as the failure of Harvard and Gentile even to 18 make the slightest investigation or determination of Bayview's 19 authorization to conduct business as a crematory, all resulted 20 in offensively irreverent disposition of the anatomical remains 21 of the class members' decedents/donors and resulting damage to 22 Ms. Favaloro and the members of the class These are the core 23 issues in the case which present issues of fact and law that 24 predominant over all issues in this matter " 25 The core issues then as to Bayview, as I read this</p>

<p style="text-align: right;">Page 34</p> <p>1 complaint, are that Bayview improperly and offensively operated 2 its crematory, had deficient and nonexistent recordkeeping 3 practices. There are other allegations, too, about Bayview 4 here; but as to Harvard and Gentile, the only allegation is 5 that they failed to make even the slightest investigation and 6 determination 7 In this argument this afternoon Mr. Charlip 8 pronounced Harvard's -- the deficiencies of Harvard and Gentile 9 with the terms that they knew or should have known about 10 Bayview's operation. Again, the construct, the language of 11 negligence 12 What is alleged in this complaint against Harvard 13 and Bayview (sic) is nothing more than negligence, that they 14 failed fully to investigate the operations of Bayview 15 And because only negligence is alleged, lack of 16 good faith is not alleged, I think -- I rule -- not I think 17 that I rule, I mean I do rule that Harvard and Bayview (sic) 18 are covered by section 13 -- excuse me, Harvard and Gentile -- 19 excuse me, Harvard and Gentile are covered by Chapter 113 20 section 13(c) of the Uniformed Anatomical Gifts Act. And as to 21 Harvard and Gentile, the motion to dismiss is granted 22 As to Bayview, however, the allegations are 23 broader, and read with all the inferences that are appropriate 24 to plaintiff I think they do -- these allegations allege bad 25 faith. Just as an example, I point to paragraph 36 of the</p>	<p style="text-align: right;">Page 36</p> <p>1 THE COURT: I didn't ask about the trustee. Do you 2 want to say anything about the trustee? 3 MR. AHERN: Yes, your Honor. Our argument 4 basically mirrors that set forth in Harvard's brief, and which 5 you've already heard from Attorney Feeney. I don't think 6 there's a sufficient allegation that the trustee herself caused 7 any harm to the only named plaintiff in the case, Favaloro. 8 THE COURT: What does a trustee do? 9 MR. AHERN: The trustee is just the legal entity, 10 the person representing the legal entity that owned the 11 property at the time the complaint was filed, and she is the 12 mother of the owner of some of the funeral parlors in 13 Massachusetts. 14 THE COURT: So the allegation against the trustee 15 simply is that she owns the -- the only allegation against the 16 trustee is that she owned these properties? 17 MR. AHERN: The allegation is that she owned the 18 property. The trust owned the property, she's the trustee of 19 the trust, and that she somehow was involved with Bayview and 20 the operation, daily operation of the crematorium, your Honor. 21 THE COURT: Isn't that enough to keep the trustee 22 in? 23 MR. AHERN: My issue, again, is that I don't think 24 the complaint goes far enough to make a connection between the 25 only named defendant -- only named plaintiff and what the</p>
<p style="text-align: right;">Page 35</p> <p>1 complaint, which alleges the following: "Bayview's operation 2 in this crematory was not only unauthorized and illegal, and 3 unauthorized in this complaint means that there is not a 4 license," the complaint goes on, it was not in compliance, 5 "Bayview was not in compliance with and did not observe the 6 standards deemed ordinary and proper for the handling and 7 cremation of decedents. Particularly, Bayview performed 8 multiple cremations simultaneously, left bodies to decompose in 9 non-refrigerated containers, generally failed to properly 10 handle the bodies of decedents, and failed to prepare, keep, 11 and maintain accurate and proper records of its business. This 12 caused Bayview to return to Harvard, and ultimately the 13 families of Ms. Favaloro and other class members, tainted and 14 contaminated remains or remains that were not consistent with 15 the unique identity of the decedent/donor." 16 I think the complaint with that language reads 17 sufficiently to allege the absence of good faith, and the 18 parties have -- counsel for Bayview have acknowledged that the 19 immunity in this statute does not apply to the crematory in any 20 event. 21 So the motion of Bayview to dismiss this complaint 22 is denied. 23 Is there anything else I need to say? 24 Just one second. 25 (Discussion off the record.)</p>	<p style="text-align: right;">Page 37</p> <p>1 trustee did or didn't do. 2 THE COURT: What do you say about that, 3 Mr. Charlip? 4 MR. CHARLIP: Paragraph 32, we allege that "Stokes 5 was fully cognizant and aware of the fact that Bayview was not 6 a state authorized and approved crematory in the State of New 7 Hampshire and had no official authority to conduct business 8 cremating the remains of decedents under any rule" -- 9 THE COURT: Slowly. 10 MR. CHARLIP: I'm sorry -- "under any rule, 11 regulation, statute or ordinance of any state of the United 12 States of America." 13 Further, we say, "Stokes was fully cognizant and 14 aware that Bayview Crematory had no authority or approval to 15 conduct business in this Commonwealth but had and maintained 16 business relations with funeral homes and funeral directors, 17 including Gentile. Stokes permitted Bayview to operate -- 18 improperly operate its unauthorized and unapproved business 19 with full knowledge of the foreseeable consequences and likely 20 effect on Favaloro and the class." 21 So I think that paragraph -- there's some other 22 paragraphs, but I think that paragraph ties in Stokes to the 23 conduct. 24 THE COURT: Yes, sir. 25 MR. AHERN: Your Honor, I think it's a pretty weak</p>

10 (Pages 34 to 37)

Favaloro v. Harvard, et al, 12/19/05 hearing

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<p style="text-align: right;">Page 46</p> <p>1 about Allegations along those lines 2 Now, if you've got something like that and you 3 think you in good faith can make that allegation, then you 4 ought to do it, but if it's just negligence -- you understand 5 that I will not -- I don't want to look at this again if all 6 you're going to tell me is negligence 7 And what is it you're going to say? Tell me -- 8 maybe I should know what it is you're going to allege 9 MR CHARLIP: Well, I think what we would allege 10 would be along the lines -- and obviously I can't give you 11 chapter and verse right now -- 12 THE COURT: No, no, you should be able to, because 13 you say you want me to not dismiss, give you a chance to 14 amend That means you know right now what it is you'll say 15 So tell me 16 MR CHARLIP: That there were funeral homes -- I'm 17 sorry, that there were crematories in the State of 18 Massachusetts that under Massachusetts law had to be owned by 19 someone other than a funeral home owner, that it was against 20 Massachusetts law to own a funeral home and a crematory, that 21 it was well-known in the industry that Derek Wallace was a 22 funeral home owner and owned two funeral homes and that he 23 formed Bayview in New Hampshire to evade the requirements of 24 Massachusetts law, that Bayview was charging -- 25 THE COURT: And that Harvard and Gentile knew all</p>	<p style="text-align: right;">Page 48</p> <p>1 you're just alleging Harvard knew all of this. 2 MR CHARLIP: I don't know what Harvard knew as I 3 stand here right now 4 THE COURT: Okay. I think I'm done 5 The motion to dismiss is with prejudice 6 MR CHARLIP: Okay 7 THE COURT: The granting of the motion to dismiss 8 is with prejudice. 9 MR CHARLIP: Your Honor, I rise only to remind you 10 you asked us to remind you -- 11 THE COURT: Thank you very much 12 On the motion to remand, I have apparently already 13 granted (sic) that motion, and there are two exceptions to the 14 removal of this case: The local controversy exception and the 15 home state exception 16 The local controversy exception fails because no 17 other class action was filed within the three-year period 18 within which this action was filed; and there are at least 19 four, I have another one, at least one of them, maybe there are 20 two other ones How many? 21 MS FEENEY: Two. 22 MR AHERN: Two, your Honor 23 THE COURT: I have two other class actions And 24 those class actions make the same or similar allegations 25 against at least some of the defendants as is made in this</p>
<p style="text-align: right;">Page 47</p> <p>1 of this 2 MR CHARLIP: Yes 3 THE COURT: They knew 4 MR CHARLIP: It was known in the industry -- 5 THE COURT: Excuse me, that Bayview (sic) and 6 Harvard knew, not known in the industry That these parties 7 knew -- if they did not know but should have known but was 8 known in the industry, that's negligence again 9 But the allegation is that somebody formed a 10 crematory in New Hampshire to avoid Massachusetts law and 11 Harvard and Gentile knew that Now, are you prepared to allege 12 that? 13 MR CHARLIP: I have not deposed Harvard, I have 14 not deposed Gentile -- 15 THE COURT: No, no At this point can you allege 16 it in good faith? Not that it's known in the industry, because 17 as I say, knowing in the industry means simply -- it may have a 18 different impact on Gentile, but Harvard is not in this 19 industry 20 MR CHARLIP: I would submit that Harvard's 21 donative body program acts in the stead of a funeral home 22 They do -- they do contract -- 23 THE COURT: You know, you're talking a legal 24 construct The question is did Harvard act in bad faith? And 25 bad faith means that they did something knowing the things</p>	<p style="text-align: right;">Page 49</p> <p>1 case 2 The home state exception reads that two-thirds or 3 more of the members of all proposed plaintiff classes in the 4 aggregate and the primary defendants are citizens of the state 5 in which the action was originally filed And the primary 6 defendants are not citizens of Massachusetts Bayview being 7 the primary -- and Stokes the primary defendants, they're all 8 citizens of New Hampshire 9 Now, there's some notion that Harvard and Gentile 10 are the primary defendants, but the primary action alleged in 11 this is the action of Bayview, and besides which, I've 12 dismissed the other two defendants 13 (Discussion off the record) 14 THE COURT: I'm reminded I'm using the wrong phrase 15 as between granted and dismissed -- granted and denied 16 The motion to remand has been denied, and is denied 17 for those reasons 18 Okay Anything further? 19 MR LEIBENSPERGER: Thank you, your Honor 20 THE COURT: If I had to write this all down, I can 21 get it straight, but since I'm -- I'm doing it from the bench 22 to get it done quickly, I need someone to remind me if I say 23 granted when I mean denied, in particular 24 Okay Just to clear things up, the motion to 25 dismiss is granted in as far as it is a motion of Harvard and</p>

13 (Pages 46 to 49)

Favaloro v. Harvard, et al, 12/19/05 hearing

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